



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2004

Ms. Hadassah Schloss
Open Records Administrator
Texas Building and Procurement Commission
P.O. Box 13047
Austin, Texas 78711

OR2004-9703

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 212927.

The Texas Building and Procurement Commission (the "commission") received two requests for information related to Request for Proposals ("RFP") 300-4-02, Tourism Advertising and Marketing Campaign Services, including the proposals submitted in response to the RFP and scoring and grading information used to determine the winning bidder. Further, the second requestor seeks information pertaining to the "BAFO" (best and final offer) stage, including the final BAFO from one particular bidder and copies of audio tape recordings from oral presentations made during the selection process, including copies of audio tape recordings made during the BAFO presentations. You have submitted some responsive information that you claim is excepted from disclosure under section 552.111 of the Government Code. Further, although you take no position with regard to the public availability of the remaining information that you have submitted, you believe that this information implicates the proprietary interests of third parties under section 552.110 of the Government Code. You notified the interested third parties of these requests for information and of their right to submit arguments to this office as to why the third parties' information should not be

released.¹ We also received correspondence from TM Advertising (“TM”) and Kolar Advertising and Marketing (“Kolar”). We have considered all of the submitted arguments and have reviewed the submitted information.

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body’s notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this decision, we have received no correspondence from StanandLou Advertising or Limb Design. Consequently, neither of these parties has demonstrated that any of the submitted information is proprietary for purposes of section 552.110 of the Government Code. *See* Gov’t Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We next address Kolar’s argument that portions of its bid proposal are excepted from disclosure under section 552.102 of the Government Code based upon the privacy rights of Kolar employees. Section 552.102(a) protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy [.]” Section 552.102(a) is applicable only to the personnel records of employees of governmental bodies. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.); Open Records Decision Nos. 444 at 3-4 (1986), 423 at 2 (1984). In this instance, the information in question relates to a private entity and its employees. Therefore, section 552.102 is not applicable to any of this information.

Next, we address TM’s argument that portions of its bid proposal are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the commission does not raise section 552.104, this section does not apply to the requested information. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Therefore, the commission may not withhold any of the information at issue under section 552.104.

¹*See* Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

Next, we note that TM seeks to withhold information that the commission has not submitted to this office for review.² This ruling does not address the arguments submitted by TM pertaining to information that has not been submitted for our review by the commission. See Gov't Code § 552.301(e)(1)(D) (governmental body seeking attorney general's opinion under Act must submit copy or representative samples of specific information requested). With respect to the information the commission has submitted for our review, we will address TM's claim under section 552.110 of the Government Code.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no

² Specifically, TM seeks to withhold the BAFO letter dated August 11, 2004 and forwarded to the commission. The commission has not submitted this letter to this office.

one submits an argument that rebuts the claim as a matter of law.³ See Open Records Decision No. 552 at 5 (1990). We cannot conclude, however, that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim under section 552.110(a). See Open Records Decision No. 402 (1983) (addressing statutory predecessor).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. See also Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Kolar and TM both assert that portions of their proposals are excepted from disclosure under section 552.110.⁴ Having considered the parties' arguments, we conclude that TM has not demonstrated that any of the information contained in its proposal is excepted from disclosure under section 552.110. See Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 494 at 6 (1988) (general allegations of unspecified competitive harm not sufficient under statutory predecessor to Gov't Code § 552.110), 319 at 3 (1982) (statutory predecessor generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Having considered Kolar's arguments, we conclude that Kolar has established a *prima facie* claim that the company's client references and its "Elaboration of the General Statement"

³The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

qualify as a trade secret under section 552.110(a). We have received no arguments that rebut Kolar's trade secret claim as a matter of law. We therefore conclude that this information, which we have marked, is excepted from disclosure under section 552.110(a). Otherwise, we conclude that Kolar has not established that any of the remaining information encompassed by the company's arguments qualifies as a trade secret under section 552.110(a). We likewise conclude that Kolar has not made the required demonstration under section 552.110(b) that the release of any of the remaining information encompassed by Kolar's arguments would be likely to cause Kolar substantial competitive harm. We therefore conclude that none of the remaining information encompassed by Kolar's arguments is excepted from disclosure under section 552.110. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 509 at 5 (1988), 494 at 6 (1988), 319 at 3 (1982).

Next, we address the commission's claim under section 552.111. This section excepts from required public disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

The commission raises section 552.111 with regard to records of the commission's review of the responses to the RFP, including individual evaluation sheets, as well as all communications and drafts regarding the evaluation and award of the contract, and comments made by the individuals who ranked the proposals. The commission asserts that

the comments represent advice, opinion, or recommendations made during a decision-making process, and that disclosing the individuals' comments would hamper frank and open discussion during the decision-making process. Having considered these arguments, we conclude that the commission may withhold the information we have marked under section 552.111, as this information consists of advice, recommendations, opinions, and other material reflecting the policymaking processes of the commission. The remaining information you seek to withhold under section 552.111 does not consist of advice, recommendations, or opinions reflecting the policymaking processes of the commission, and thus may not be withheld under that exception.

Lastly, we note that the proposals, as well as some of the information for which the commission claims the applicability of 552.111, contain information that is protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information must comply with the copyright law, however, and is not required to furnish copies of records that are copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary: (1) the commission must withhold the marked information relating to Kolar that is excepted from disclosure under section 552.110; and (2) the commission may withhold the information we have marked under section 552.111. The commission must release the rest of the submitted information. In releasing information that is protected by copyright, the commission must comply with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal flourish extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 212927

Enc. Submitted documents

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